

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORLAND DIVISION

11 **CIANI NATAI BOSTIC,**

)

12) Plaintiff,

)

13) 03:10-cv-01153-HU

14 vs.

)

15) **FINDINGS AND**
16) **RECOMMENDATION**

MICHAEL J. ASTRUE,

)

16) Commissioner of Social Security,

)

17) Defendant.

)

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9 HUBEL, Magistrate Judge

10 Claimant Ciani Natai Bostic ("Claimant") seeks judicial review
 11 of a final decision of the Commissioner of Social Security
 12 ("Commissioner") denying her application for Supplemental Security
 13 Income ("SSI") disability payments under Title XVI of the Social
 14 Security Act, 42 U.S.C. §§ 1381-83f. This court has jurisdiction
 15 to review the Commissioner's decision pursuant to 42 U.S.C. §
 16 405(g). Following a careful review of the record, I conclude that
 17 the Commissioner's decision should be REVERSED and REMANDED for
 18 further proceedings consistent with this Findings and
 19 Recommendation and the parameters provided herein.

20 **I. PROCEDURAL BACKGROUND**

21 Claimant protectively filed an application for SSI disability
 22 payments on August 24, 2006, alleging an onset date of January 1,
 23 1995.¹ (Tr. 67-68.) Claimant's application was denied initially on
 24 December 27, 2006, and upon reconsideration on April 24, 2007. (Tr.
 25 69-72, 80-82.) Claimant requested a hearing before an

26
 27 ¹ Conversely, the ALJ's written decision indicates that
 28 Claimant's application was filed on August 18, 2006. (Tr. 14, 21.)

1 Administrative Law Judge ("ALJ"), which was conducted on April 15,
 2 2009. (Tr. 29-66, 83.) A supplemental hearing was held on August
 3 5, 2009. (Tr. 22-28.)

4 On August 19, 2009, the ALJ issued his decision finding
 5 Claimant not disabled. (Tr. 11-21.) On August 25, 2009, Claimant
 6 timely requested review of the ALJ's decision. (Tr. 7-10.) On
 7 August 4, 2010, the Appeals Council denied this request, making the
 8 ALJ's decision the final decision of the Commissioner that is
 9 subject to judicial review. (Tr. 1-5.)²

11 ***II. FACTUAL BACKGROUND***³

12 Claimant alleges disability based on an affective disorder,
 13 anxiety disorder, personality disorder, and/or conduct disorder.

15 ²Claimant also filed applications for SSI benefits on November
 16 25, 2003, and October 6, 2004, alleging disability onset dates of
 17 November 1, 1998 and January 1, 1995. (Tr. 98-99, 101-02.) The
 18 applications were denied on May 17, 2004, and December 29, 2004,
 19 respectively. (Tr. 85-89, 90-97.) It appears that Claimant did not
 appeal.

20 ³ Although the record contains medical evidence from Claimant's
 21 previous applications, neither the ALJ nor the parties relied on
 22 evidence from the prior applications in this case. At the April
 23 15, 2009 hearing, the ALJ suggested that the inclusion of the
 24 "prior SSI files from the past" was unnecessary. (Tr. 33.) As a
 25 result, that evidence will not be summarized in the Factual
 26 Background of this decision. See *Ellis v. Astrue*, No. 08-CV-1021,
 27 2010 WL 695654, at *5-6 (E.D. Wis. Feb. 23, 2010) ("the record
 28 evidence regarding [claimant]'s prior applications is not pertinent
 to his current application for [SSI] benefits because he does
 not . . . seek to reopen prior benefit applications. . . .
 [Claimant] did not appeal these unfavorable decisions and he cannot
 now ask for a different decision based on the same evidence."); see
 also 20 C.F.R. § 416.335 ("the earliest month for which we can pay
 you benefits is the month you filed the application [for SSI
 benefits]").

1 (Tr. 67-68, 73.) Claimant has a high school education and a work
2 history that consists primarily of volunteer work at the Oregon
3 Wildlife Reserve. (Tr. 502.) Claimant was twenty-three years old
4 on the date of the hearings before the ALJ. (Tr. 67.)
5

6 ***A. Summary of the Medical Evidence***

7 ***1. Consultants' Reports***

8 On June 6, 2006, Jill Spendal ("Spendal"), Psy.D., conducted
9 a Learning and Psychological Evaluation on Claimant. (Tr. 500-16.)
10 Spendal began by noting that Claimant has a history of special
11 education classes and struggles with reading, math, and oral
12 comprehension. (Tr. 500.) Claimant also had a "long standing
13 mental health history related to childhood events, including her
14 parents divorce, being taken away from her mother, living with an
15 emotionally unavailable and angry father, and sexual abuse by a
16 step-grandfather." (Tr. 500.) According to Spendal, Claimant
17 described mental health symptoms that are "consistent with both
18 depression and anxiety, as well as possible Axis II disorders."
19 (Tr. 500.)
20

22 Claimant graduated from high school the year before Spendal's
23 examination and "has not worked since that time. She spends her
24 time hanging out with a friend, but mostly described herself as
25 being bored. Lately she has been exercising to fill time and to
26 lose weight." (Tr. 501.) Because Claimant was concerned with her
27 weight, she reportedly lost twenty pounds in approximately three to
28

1 four months. (Tr. 502.) According to Spendal, Claimant "appears
2 to be under weight for her age and [] restricting her food intake
3 is not healthy, and while not yet the level of an eating disorder
4 it is problematic and should be monitored by a professional." (Tr.
5 503.)

6 Claimant endorsed the following symptoms consistent with
7 either a dysthymic disorder or major depressive disorder: staying
8 in her room and isolating herself, crying, sleeping more, eating
9 less, poorer concentration, and thoughts of suicide. (Tr. 503.)
10 She also reported the following symptoms consistent with a possible
11 social phobia or anxiety disorder: extreme nervousness around
12 groups of people or unknown people, fear of going out in the world
13 alone, panic attacks when in public, and difficulty speaking with
14 males, even her own brother. (Tr. 503.) With respect to
15 posttraumatic stress disorder ("PTSD"), Claimant reported a history
16 of flashbacks to sexual abuse, hypervigilance of her environment,
17 heightened startle response when alone, avoiding certain places or
18 people that remind her of the abuse, emotional numbness, emotional
19 distance from others, even her mother, and difficulty expressing
20 emotions. (Tr. 504.)

21 Spendal administered the following tests during her
22 evaluation: Structured Clinical Interview; Wechsler Adult
23 Intelligence Scales, Third Edition ("WAIS-III"); Woodcock-Johnson,
24 Third Edition, Tests of Achievement ("WJ-III"), and Millon Clinical
25

1 Multiaxial Inventory, Third Edition ("MCMI-III"). (Tr. 505.) In
2 Spendal's opinion, Claimant was cooperative "and appeared to put
3 good effort into all tasks." (Tr. 504.)

4 Ultimately, Spendal diagnosed Claimant with: Dysthymic
5 Disorder, Social Phobia, PTSD, and Avoidant Personality Disorder.
6 (Tr. 512.) An eating disorder diagnosis was "not currently
7 appropriate[.]" (Tr. 511.) According to Spendal, because there are
8 very few

9 employment opportunities that do not involve contact with
10 other people it will be very difficult for C[claimant]
11 to . . . work until she obtains successful treatment for
12 her Social Phobia, PTSD, and Avoidant Personality
13 Disorder. The combination of these disorders makes
14 C[claimant] have significant difficulty attending and
15 comprehending oral communication when around unknown (and
16 sometimes even known) people. She is uncomfortable
17 especially around men (related to PTSD)[.]. . . The
18 avoidant traits cause her to want to avoid most social
19 situations, and the social phobia makes her fear
20 rejection and humiliation in even the most mundane of
21 social situations.

22 (Tr. 512.) Spendal opined that, "[u]ntil C[claimant] is able to be
23 around people (which will not happen until she can treat her social
24 phobia at least) she is not likely to be able to work in jobs that
25 involve contact with other people. However, she will need pretty
26 intensive training (which requires being around people) due to
27 attentional limitations, making her working a difficult task at this
28 time." (Tr. 515.) Spendal also recommended that Claimant should
29 avoid "jobs or projects" with time deadlines because she would
30 perform "very poorly" on such tasks. (Tr. 516.)

1 On August 28, 2006, Spendal provided an addendum to her June
 2 6, 2006 Learning and Psychological Evaluation. (Tr. 517.)
 3 Specifically, she noted that Claimant's "restriction of eating
 4 ha[s] now expanded to included purging behavior." (Tr. 517.) As
 5 a result, Spendal opined that an Eating Disorder diagnosis needed
 6 to be considered and addressed, although a "specific diagnosis"
 7 could not be given without further evaluation. (Tr. 517.)

9 On December 22, 2006, a state agency psychologist, Paul
 10 Rethinger ("Rethinger"), Ph.D., completed a Psychiatric Review
 11 Technique Form, wherein he evaluated Claimant's impairments under
 12 listings 12.04 (affective disorders), 12.06 (anxiety-related
 13 disorders), and 12.08 (personality disorders). (Tr. 541-50.) He
 14 concluded that the limitations imposed by Claimant's impairments
 15 failed to satisfy listing 12.04, 12.06, or 12.08. (551-52.)
 16 Rethinger's notes provided that:

17 Spendal PsyD, states given that there are few employment
 18 opportunities that do not involve contact with other
 19 people it would be very difficult for claimant to work
 20 until she receives tx for social phobia. Some weight
 21 given but not all. Spendal has only seen claimant once or
 22 twice and per claimant's adls she does feel comfortable
 23 around people she knows and does go out.

24 (Tr. 553.)⁴

25 On December 22, 2006, Rethinger also submitted a Mental

26 ⁴ Rethinger does not specify what evidence in the record
 27 supports his conclusion that "per claimant's adls she does feel
 28 comfortable around people she knows and does go out." (Tr. 553.)

1 Residual Functional Capacity Assessment, which describes Claimant
 2 as "[m]oderately [l]imited" in four of twenty categories of mental
 3 activity and "[n]ot [s]ignificantly [l]imited" in fifteen. (Tr.
 4 555-56.) Claimant's "ability to interact appropriately with the
 5 general public" was the only category Rethinger rated as
 6 "[m]arkedly [l]imited." (Tr. 556.) Rethinger opined that Claimant
 7 "is able to understand, remember and carry out simple tasks but due
 8 to anxiety would not be able to consistently handle detailed
 9 tasks." (Tr. 557.) Rethinger also stated, "[d]ue to anxiety
 10 claimant would do best not working with [the] general public and
 11 working either independently or in smaller group setting[s].
 12 [Claimant] [c]an do well in small group setting[s] with employees
 13 she is familiar with." (Tr. 557.)

16 **2. *Claimant's Medical Records***

17 On November 29, 2000, Claimant's mother, Donna Berjettej
 18 ("Berjettej"), completed a Parent/Caregiver Information Form at
 19 Trillium Family Services in Portland, Oregon. (Tr. 165.) Berjettej
 20 indicated that she was seeking counseling for her daughter as
 21 "[p]art of on-going care from treatment received in Minnesota."
 22 (Tr. 165.) Berjettej reported that Claimant suffered from the
 23 following problems: "Sleeping Problems"; "Poor Attention";
 24 "Withdrawal"; "Depression"; "Low Self-Esteem"; and "Suicide
 25 Threats." (Tr. 165.) Berjettej noted that Claimant had been
 26 hospitalized on three occasions due to suicide attempts. (Tr. 165,
 27
 28

1 167.) Berjettej also reported that Claimant suffered from the
 2 following types of trauma/stressors: "Neglect", "Sexual Abuse",
 3 "Violence in the Home", "Multiple Family Moves", "Emotional Abuse",
 4 "Parent Substance Abuse", and "Parents Separated/Divorced." (Tr.
 5 169.) Berjettej hoped that pursuing counseling would help Claimant
 6 "become[] more social, less afraid of social situations[.]" (Tr.
 7 171.)

8 On February 27, 2002, Jonathan Valen, M.D., completed a
 9 Discharge Report, which indicated that Claimant had been
 10 hospitalized due to "severe depression with suicidal ideation."
 11 (Tr. 445.) Claimant stated that "she had significant anxiety and
 12 depressive symptoms regarding family issues." (Tr. 445.) Claimant
 13 was no longer suicidal while in the hospital. (Tr. 445.) Her
 14 mother reported that "she believes that C[claimant]'s difficulties
 15 were a direct result of stress at home." (Tr. 445.) Upon being
 16 discharged, Claimant was described as "stable" and "no longer
 17 endorsing depressive symptoms or suicidal ideation." (Tr. 446.)

18 A Clackamas County Mental Health Diagnostic Review Form dated
 19 February 19, 2003, indicates that Claimant has a

20 past history of failing school, and anxiety as well as
 21 depression concerns that required hospitalization.
 22 C[claimant] has faced multiple challenges in her life such
 23 as domestic violence, separation from her primary
 24 caregiver during latency and prepubescent ages, sexual
 25 abuse during the age of 9 through 12, social and school
 26 failure, and more recently a move to a predominantly
 27 Caucasian suburb in Oregon from Minnesota.

28 In response to the multiple stressors and traumas,

1 C[claimant] has relied on self destructive and avoidant
2 coping patterns w[ich] have severely impacted her
3 ability to perform in school and develop age appropriate
4 interpersonal skills. She has multiple symptoms related
5 to anxiety disorders including intrusive recollections of
6 the past sexual abuse, fears of being taken from her
mother, anticipatory anxiety, and fears of being judged
by others. Depressive symptoms present are sleep trouble,
feeling of hopelessness, low energy, and occasional
suicidal ideation.

7 (Tr. 393-94.)

8 On August 14, 2006, Cheryl Hickethier ("Hickethier"), M.D.,
9 completed a progress note that indicated Claimant's anxiety and
10 PTSD were improving with the use of Cymbalta. (Tr. 540.)
11 Claimant's energy levels had improved as well. (Tr. 540.)

12 On October 31, 2006, Claimant saw Jennifer Lochner
13 ("Lochner"), M.D., at Oregon Health & Science University ("OHSU")
14 to discuss stomach cramps, which Claimant thought were the result
15 of stress. (Tr. 906.) At that time, Claimant was involved in a
16 program to get a job and reported experiencing "anxiety attacks."
17 (Tr. 906.)

18 On October 5, 2007, Claimant saw Jonathan Betlinski
19 ("Betlinski"), M.D., at OHSU. (Tr. 904.) Betlinski's progress
20 notes provide, in pertinent part, that:

21 Patient reports she has been feeling more depressed
22 lately. . . . Has been isolating more, staying in her
23 room sketching. . . . Energy low. Sleep is poor; has
24 difficulty falling asleep and staying asleep. Memory and
25 concentration are deteriorating, though she feels this is
26 due to propanolol[.]. . . Has been having suicidal
27 thoughts and thoughts of self-harm, 'but usually I try to
28 distract myself.' Finds this more difficult to do,
lately. . . . Anxiety levels have been higher, are

1 generally constant. Generally feels safe only in her
 2 room.

3 (Tr. 904.) Betlinski's notes indicate that Claimant had issues
 4 with "Anorexia Nervosa, r/o Bulimia Nervosa"; however, he also
 5 stated "[n]o report of problematic eating disorder behaviors
 6 today." (Tr. 904.)

7 In a February 1, 2008 progress note, Betlinski indicated that
 8 Claimant's anxiety was "fairly well controlled." (Tr. 889.)

9 On April 9, 2008, Claimant reported to Betlinski that she felt
 10 better after being prescribed a higher dosage of Zoloft. (Tr.
 11 902.) Betlinski noted that Claimant's anxiety was also controlled
 12 with propanolol, and she was no longer having suicidal thoughts.
 13 (Tr. 902.)

14 In Betlinski's April 15, 2008 chart note, Claimant discussed
 15 a trip to the beach with friends. (Tr. 884.) Claimant was also
 16 looking forwards to the summer "so she can go fishing and camping
 17 in Molalla again." (Tr. 884.) Betlinski indicated Claimant has "a
 18 history of PTSD, depression and an eating disorder [which] appear[]
 19 to be grieving [sic] appropriately." (Tr. 885.) Betlinski found
 20 Claimant's anxiety to be "generally low." (Tr. 885.)

21 On February 5, 2009, Claimant saw Betlinski and reported that
 22 she was "[f]eeling much better, which she attributed to applying
 23 for [a] job and actually getting an interview." (Tr. 876.)
 24 Apparently,

25 [t]he whole [job search] process scares [Claimant] a

little. Mom has seemed more distant: 'and for some reason, I got the feeling she thought I'm going to die.' [Claimant] [b]elieves her job hunt may be contributing to mom's feelings: 'I don't really know how to comfort her, so I just tell her I'm here mom, and I'm not going anywhere.'

(Tr. 876.)

On February 26, 2009, Claimant met with Betlinski and reported that she was still looking for a job. (Tr. 874.) Claimant mentioned that "[h]aving SSDI would be nice, but would rather earn her way." (Tr. 874.) Betlinski indicated there was no recurrence of eating disorder symptoms and medications continued to be helpful to Claimant. (Tr. 874.)

B. Claimant's Testimony

1. Hearing Testimony

Claimant's initial hearing was held on April 15, 2009. (Tr. 27.) At that time, Claimant was looking for work and "trying to start" school, but claimed "anxiety kind of stops me from doing any of that." (Tr. 37.) She testified that her anxiety makes her sweat and "get really tense, like, a knot in my stomach kind of feels." (Tr. 38.) Claimant's anxiety also interferes with her ability to enjoy social activities because she feels "nervous all the time." (Tr. 38.) In terms of her ability to focus, Claimant testified that her anxiety is "about an eight or a nine [out of ten]. It's just really hard for me to concentrate on what people are saying sometimes." (Tr. 38.)

1 Claimant's counsel then proceeded with the following line of
2 questions:

3 Q Do you find yourself talking to people and just
4 turning them off or freezing up in the communication?

5 A Well, it's, like, I hear them but at the same time I
6 don't when I get too anxious.

7 Q So the words come to you but it's as though they're
8 just noise?

9 A In a way, yeah.

10 (Tr. 38-39.)

11 Claimant indicated she has a few friends and suggested that
12 her anxiety around them varies depending on the length of their
13 relationship. (Tr. 39.) Claimant has performed limited volunteer
14 work in the past and ultimately received her diploma from an
15 Adolescent Day Treatment Center ("ADTC"). (Tr. 40.) When Claimant
16 did attend regular high school she was "always getting detention
17 because I never showed up." (Tr. 40.) Attending high school made
18 Claimant "nervous all the time, doing natural things that you're
19 supposed to do in high school." (Tr. 40.) Claimant testified she
20 would have difficulty holding down a job since "it would be just
21 high school all over again. I wouldn't be able to show up because
22 I'm nervous all the time." (Tr. 44.)

23 Claimant stated that doctors and/or counselors had diagnosed
24 her with bulimia, social anxiety disorder, and depression. (Tr.
25 41.) As a result of her depression, Claimant often times will
26

1 isolate herself in her house because she gets "so sick of being
2 nervous all the time so I just stay at home." (Tr. 41.)

3 In the past Claimant had "self-mutilated or cut [herself]";
4 however, she stated that this practice ended about two years ago.
5 (Tr. 42.) Claimant believes this behavior is the result of the
6 sexual abuse she experienced as a child. (Tr. 42.) Claimant also
7 stated that she experiences flashbacks on a weekly basis regarding
8 the abuse she suffered. (Tr. 43-44.)

9
10 Claimant receives psychiatric treatment at OHSU on a monthly
11 basis. (Tr. 44.) For a little over a year, Claimant has been
12 taking "Zoloft and for anxiety . . . Propranolol." (Tr. 45.)
13 Although Claimant has varied her medication in the past because
14 "didn't really feel anything," she believes Zoloft has helped "a
15 lot more" than other medications. (Tr. 45.) Claimant does not
16 take Propanolol on a regular basis since her "shrink says that, you
17 know, whatever works for you." (Tr. 46.)

18
19 Claimant testified she lives at home with her mother, who has
20 not worked for an extended duration of time. (Tr. 47.) Apparently,
21 Claimant has been dating a young man for seven years. (Tr. 46-48.)
22 Claimant and her boyfriend spend their time together watching
23 movies, riding bikes, doing household chores, and shopping. (Tr.
24 49.) At times, Claimant's friends will pick her up so they can
25 hangout together. (Tr. 50.) Claimant also rides the bus. (Tr.
26 50.)

///

2. Written Testimony

On September 19, 2006, Berjettej completed a Function Report on Claimant's behalf. (Tr. 209-16.) Claimant's daily activities were listed as: talking on the phone, watching television, surfing the internet, and attending appointments. (Tr. 209.) Claimant reportedly has no difficulty with personal care, takes care of a pet, and has "never [been] able to work or be around people." (Tr. 210.)

Claimant's condition can make it difficult for her to sleep and cause her to oversleep. (Tr. 210.) She prepares meals on a daily basis, such as salads, cereal, noodles, sandwiches, and frozen dinners. (Tr. 211.) Claimant is also capable of performing household chores, such as cleaning and laundry. (Tr. 211.) Claimants reports that she goes outside "[a]lmost every day" and uses public transportation; however, she does not go out alone because of her "anxiety attacks." (Tr. 212.) Claimant indicates that she goes shopping for food and clothes. (Tr. 212.) Claimant is unable to pay bills, handle a bank account, or write checks, but she is capable of counting change. (Tr. 212.)

Claimant's hobbies and interests consist of drawing, watching television, surfing the net, and arts and crafts. (Tr. 213.) For social activities, Claimant reportedly talks on the phone, rides her bike, and uses the internet on a daily basis. (Tr. 213.)

1 Claimant stated, "I don't socialize because of the anxiety." (Tr.
 2 214.)

3 Claimant's condition affects her memory; her ability to
 4 complete tasks; her concentration; her understanding; and her
 5 ability to follow instructions. (Tr. 214.) She reports that she
 6 can pay attention "not long" and cannot follow instructions. (Tr.
 7 214.) Claimant also reportedly "hear[s] voices" and "see[s]
 8 things." (Tr. 215.)

10 ***C. Third-Party Testimony***

11 ***1. Hearing Testimony***

12 Berjettej testified at the hearing on April 15, 2009. (Tr.
 13 51.) Berjettej confirmed that Claimant's boyfriend lives with them
 14 and, despite his own mental disabilities "that he refuses to
 15 address," is a positive influence on Claimant. (Tr. 52.) When
 16 asked to describe examples of Claimant's functional limitations,
 17 Berjettej stated:

18 Personally, I see - you have to pardon me. I'm in pain
 19 here. But I don't want to embarrass her but I need to let
 20 the courts know that I still see a lot of immaturity and
 21 -- [] I see her struggling. It's, like, she's in an
 22 immaturity-type bag so to speak and she's fighting to get
 23 her way out of it. And she needs a lot of assistance
 24 with every day life. And she doesn't know how to, she
 25 doesn't know how to say, for instance, write a check or
 pay a bill. When it comes to being in the public [], her
 anxiety is on high.

26 (Tr. 51-52.) Berjettej has observed that Claimant's symptoms cause
 27 her to "zone" and "kind of stare off into space[.]" (Tr. 53.)

1 Berjettej receives the same reaction from Claimant when she
 2 discusses a topic that Claimant "doesn't understand." (Tr. 54.)

3 Berjettej confirmed that Claimant attended an ADTC; however,
 4 it "got closed down from lack of funding, [and] they put her back
 5 into Clackamas High[.] . . . And then they also set it up where she
 6 was going to different programs around the city. So she would be
 7 bussed to different places around the city for schooling." (Tr.
 8 55.) Claimant was not "mainstream[ed]" because of her anxiety and
 9 dysthymia. (Tr. 55.)

10 Berjettej indicated that, prior to leaving Minnesota when
 11 Claimant was thirteen, she had lost custody of Claimant for about
 12 five years. (Tr. 56.)

13 According to Berjettej, because Claimant does not have any
 14 kind of medical coverage, Betlinksyi has been seeing Claimant on a
 15 voluntary basis. (Tr. 57-58.)

16 Berjettej has not worked since 2005 because she has some
 17 disabilities of her own, such as dysthymia, fibromyalgia, and heart
 18 issues. (Tr. 59.) As a result, the family supports itself with
 19 food stamps and a "Section VIII" housing voucher that pays the rent
 20 and utilities. (Tr. 59, 61.) Berjettej also has a social security
 21 application of her own currently pending. (Tr. 59.)

22 **2. Written Testimony**

23 Berjettej completed a Function Report - Adult - Third Party on
 24 April 25, 2007. (Tr. 241-58.) In regards to Claimant's daily

1 activities, Berjettej observed that, "[m]ost of her time is spent
2 sleeping. She does get up to fix something to eat but the meal may
3 consist of just a carrot. She may spend time with the cat, watching
4 TV, or making her F[i]mo characters." (Tr. 241.) Berjettej
5 indicated that Claimant gives her cat baths, but Berjettej cleans
6 the litter box and feeds the cat. (Tr. 242.)

8 Because of the side effects of Claimant's medications, "she
9 may stay up all night and sleep all day." (Tr. 242.) Claimant has
10 no difficulty with personal care, but she does need reminders to
11 take her medications. (Tr. 242-43.) If Claimant prepares food, it
12 usually consists of sandwiches or frozen dinners; however, when the
13 family can afford, Claimant "makes (expensive) meals." (Tr. 243.)
14 Claimant is described as "meticulous" when she prepares food and
15 performs household chores, such as cleaning and laundry. (Tr.
16 243.)

18 Based on Berjettej's observations, Claimant rarely leaves
19 their apartment, unless she has an appointment. (Tr. 244.)
20 Berjettej believes Claimant does not go out alone because of her
21 "extreme anxiety," which surfaces "even . . . when someone comes to
22 visit." (Tr. 244.) Berjettej indicated, however, that Claimant
23 will go shopping in stores and spend "hours [] searching for the
24 right doll." (Tr. 244.) Claimant does not pay bills, handle a
25 bank account, or write checks because she "[d]oes not have the
26 every day logistics of life to handle it . . . or understand it."
27

1 (Tr. 244.)

2 With respect to hobbies and interests, Berjettej noted that
 3 Claimant "[i]s gifted in art" and enjoys "[w]atching cartoons and
 4 making either F[i]mo dolls, drawing, or playing with her dolls."
 5 (Tr. 245.) Claimant's social activities consist primarily of time
 6 spent with her mother and/or Jeff at home. (Tr. 245.) In fact,
 7 Berjettej claims she "never does anything or goes anywhere
 8 social[ly]." (Tr. 246.)

9
 10 Berjettej believes that Claimant's conditions affects her
 11 memory; ability to complete tasks; ability to concentrate; ability
 12 to understand; ability to follow instructions; and ability to get
 13 along with others. (Tr. 246.) According to Berjettej, Claimant
 14 does not handle stress well; she gets frustrated and shuts down
 15 when her routine changes; and "[t]ends to resort to wanting to be
 16 spoiled." (Tr. 247.) Berjettej's final remarks were:

17
 18 C[claimant] needs guidance and a lot of understanding.
 19 She wants to work so badly and has tried to overcome her
 20 'mental blocks' but for whatever reasons [she cannot] (I
 21 know because I have been seeing and witnessing her for
 22 the past 9 years that we have since been back together).

23 I have tried to the best of my ability and I miss the
 24 person she used to be when she was years younger -
 25 fearless, easy-going- and smart. Now she is just a shell
 26 of her former self.

(Tr. 248.)

27
D. Vocational Expert's Testimony

28 On August 5, 2009, the ALJ held a supplemental hearing in

1 order to take testimony from a Vocational Expert ("VE") after all
2 of Claimant's current medical records had been received. (Tr. 24.)
3 The ALJ began by providing the VE with background information on
4 Claimant. (Tr. 25.) Specifically, that she has been looking for
5 work, was "trying to start school but her anxiety was poor";
6 received a diploma "at an adolescent day treatment alternative
7 school"; and had no work history to the ALJ's knowledge. (Tr. 25.)

8 The ALJ asked the VE to consider a hypothetical claimant who
9 has no demonstrated exertional impairments, but has "certain non-
10 exertional impairments such that she would be limited to routine,
11 unskilled work with no public contact." (Tr. 25.) Taking in
12 account Claimant's "age, education and, in this case, no work
13 history," that ALJ asked the VE whether "there [are] other jobs
14 existing in the State in which she resides or the several regions
15 of the country that she could perform?" (Tr. 25.) The VE
16 indicated that, given that hypothetical, there would be three
17 possibilities: a kitchen helper, a warehouse worker, and a hand
18 packer. (Tr. 25-26.)

19 The ALJ then asked the VE to consider a hypothetical claimant
20 that "has an underlying affective and/or anxiety reaction such that
21 she would be absent from the workplace, but such absences . . .
22 would occur unpredictably . . . [and] could reach two or more days
23 a month." (Tr. 26.) The VE stated that such an individual could
24 not sustain employment in the occupations previously recited. (Tr.
25
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1 26.)

2 The hearing concluded with Claimant's counsel posing a
 3 hypothetical to the VE, which essentially asked if a hypothetical
 4 claimant could sustain employment if their symptoms prevented them
 5 from working for an hour a day "not in the normal work break
 6 periods." (Tr. 27.) The VE testified that an individual with this
 7 limitation would not be able to sustain employment. (Tr. 27.)

8 **III. DISABILITY DETERMINATION AND THE BURDEN OF PROOF**

9 **A. Legal Standards**

10 A claimant is disabled if he or she is unable to "engage in
 11 any substantial gainful activity by reason of any medically
 12 determinable physical or mental impairment which . . . has lasted
 13 or can be expected to last for a continuous period of not less than
 14 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

15 "Social Security Regulations set out a five-step sequential
 16 process for determining whether an applicant is disabled within the
 17 meaning of the Social Security Act." *Keyser v. Commissioner*, 648
 18 F.3d 721, 724 (9th Cir. 2011) (citing 20 C.F.R. § 404.1520)). The
 19 Keyser court described the five steps in the process as follows:

20 (1) Is the claimant presently working in a substantially
 21 gainful activity? (2) Is the claimant's impairment
 22 severe? (3) Does the impairment meet or equal one of a
 23 list of specific impairments described in the regulations?
 24 (4) Is the claimant able to perform any work that
 25 he or she has done in the past? and (5) Are there
 26 significant numbers of jobs in the national economy that
 27 the claimant can perform?

28 *Keyser*, 648 F.3d at 724-25 (citing *Tackett v. Apfel*, 180 F.3d 1094,

1 1098-99 (9th Cir. 1999)); *see Bustamante v. Massanari*, 262 F.3d
 2 949, 953-54 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1520 (b)-(f)
 3 and 416.920 (b)-(f)). The claimant bears the burden of proof for
 4 the first four steps in the process. If the claimant fails to meet
 5 the burden at any of those four steps, then the claimant is not
 6 disabled. *Bustamante*, 262 F.3d at 953-54; *see Bowen v. Yuckert*,
 7 482 U.S. 137, 140-41, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119
 8 (1987); 20 C.F.R. §§ 404.1520(g) and 416.920(g) (setting forth
 9 general standards for evaluating disability), 404.1566 and 416.966
 10 (describing "work which exists in the national economy"), and
 11 416.960(c) (discussing how a claimant's vocational background
 12 figures into the disability determination).

15 The Commissioner bears the burden of proof at step five of the
 16 process, where the Commissioner must show the claimant can perform
 17 other work that exists in significant numbers in the national
 18 economy, "taking into consideration the claimant's residual
 19 functional capacity, age, education, and work experience." *Tackett*
 20 *v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner
 21 fails meet this burden, then the claimant is disabled, but if the
 22 Commissioner proves the claimant is able to perform other work
 23 which exists in the national economy, then the claimant is not
 24 disabled. *Bustamante*, 262 F.3d at 954 (citing 20 C.F.R.
 25 §§ 404.1520(f), 416.920(f)); *Tackett*, 180 F.3d at 1098-99).

27 The ALJ determines the credibility of the medical testimony
 28

1 and also resolves any conflicts in the evidence. *Batson v. Comm'r*
 2 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004) (citing
 3 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)).
 4 Ordinarily, the ALJ must give greater weight to the opinions of
 5 treating physicians, but the ALJ may disregard treating physicians'
 6 opinions where they are "conclusory, brief, and unsupported by the
 7 record as a whole, . . . or by objective medical findings." *Id.*
 8 (citing *Matney, supra*; *Tonapetyan v. Halter*, 242 F.3d 1144, 1149
 9 (9th Cir. 2001)). "[T]he Commissioner must provide clear and
 10 convincing reasons for rejecting the uncontradicted opinion of an
 11 examining physician. . . . [And,] the opinion of an examining
 12 doctor, even if contradicted by another doctor, can only be
 13 rejected for specific and legitimate reasons that are supported by
 14 substantial evidence in the record." *Lester v. Chater*, 81 F.3d
 15 821, 830-31 (9th Cir. 1995) (citations and internal quotation marks
 16 omitted).

17 The ALJ also determines the credibility of the claimant's
 18 testimony regarding his or her symptoms:

19 In deciding whether to admit a claimant's subjective
 20 symptom testimony, the ALJ must engage in a two-step
 21 analysis. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
 22 1996). Under the first step prescribed by *Smolen*, . . .
 23 the claimant must produce objective medical evidence of
 24 underlying "impairment," and must show that the
 25 impairment, or a combination of impairments, "could
 26 reasonably be expected to produce pain or other
 27 symptoms." *Id.* at 1281-82. If this . . . test is satis-
 28 fied, and if the ALJ's credibility analysis of the
 claimant's testimony shows no malingering, then the ALJ
 may reject the claimant's testimony about severity of

1 symptoms [only] with "specific findings stating clear and
 2 convincing reasons for doing so." *Id.* at 1284.

3 *Batson*, 359 F.3d at 1196.

4 ***B. The ALJ's Decision***

5 ***1. Steps One and Two***

6 At Step One, the ALJ concluded that Claimant had not engaged
 7 in substantial gainful activity since August 18, 2006, the
 8 application date. (Tr. 16.) At Step Two, the ALJ determined that
 9 Claimant suffered from the following severe impairments: dysthymic
 10 disorder ("dysthymia"), social phobia, PTSD, and avoidant
 11 personality disorder. (Tr. 16.)

12 ***2. Step Three***

13 At Step Three, the ALJ concluded that "[C]laimant's mental
 14 impairments, considered singly and in combination," failed to "meet
 15 or medically equal[] one of the listed impairments in 20 CFR Part
 16 404, Subpart P, Appendix 1 (20 CFR 416.925 and 416.926)." (Tr.
 17. 16.) In particular, the ALJ found that Claimant's activities of
 18 daily living were only *mildly* restricted. (Tr. 16.) As to social
 19 functioning, the ALJ found Claimant's difficulties to be *moderate*.
 20 (Tr. 17.) With respect to concentration, persistence or pace,
 21 Claimant was determined to have "*mild* to *moderate* difficulties."
 22 (Tr. 17.) As to decompensation, treatment records reflected that
 23 Claimant had experienced no episodes of decompensation of an
 24 extended duration. (Tr. 17.)

1 In evaluating Claimant's dysthymia, the ALJ determined that
2 the medical records were not indicative of "repeated episodes of
3 decompensation each of extended duration, a residual disease
4 process that has resulted in such marginal adjustment that even a
5 minimal increase in mental demands or change in environment would
6 cause decompensation, or a current history of [one] or more years
7 inability to function outside of a highly supportive living
8 arrangement." (Tr. 17.) As to Claimant's social phobia and PTSD,
9 the ALJ found that medical treatment records failed to indicate
10 that "these impairments resulted in the claimant's complete
11 inability to function independently outside the area of her home."
12 (Tr. 17.)

13 **3. *Claimant's RFC***

14 After considering the entire record, the ALJ concluded that
15 Claimant has the RFC "to perform a full range of work at all
16 exertional levels but with the following nonexertional limitations:
17 she is limited to routine, unskilled work with no public contact."
18 (Tr. 17.)

19 While the ALJ agreed that Claimant's medically determinable
20 impairments could reasonably be expected to cause her alleged
21 symptoms, he found Claimant's "statements concerning the intensity,
22 persistence and limiting effects of these symptoms [] not credible
23 to the extent that they are inconsistent with the above [RFC]
24 assessment." (Tr. 18.)

1 In support of his decision, the ALJ summarized the record as
2 follows: Claimant's medical records reflect that she has been
3 diagnosed with several mental health impairments, such as
4 dysthymia, depressive disorder, anxiety disorder, a learning
5 disorder, PTSD, and anorexia. (Tr. 18.) Claimant had been
6 prescribed Prozac, Paxil and Celexa to treat her depression and
7 anxiety symptoms. (Tr. 18.) She also attended individual
8 counseling to further alleviate her symptoms. (Tr. 18.)

9
10 After a June 2006 psychological evaluation, Spendal diagnosed
11 Claimant with dysthymia, generalized social phobia, chronic PTSD,
12 and avoidant personality disorder with dependent and borderline
13 features. (Tr. 18.) Spendal opined that Claimant would have
14 difficulty working due to impaired auditory attentional abilities,
15 social phobia, difficulty concentrating, and low academic levels.
16 (Tr. 18.) The ALJ only assigned Spendal's opinion "[s]ome weight"
17 and noted that the described limitations were consistent with his
18 RFC assessment. (Tr. 19.)

19
20 Despite Claimant's history of mental impairments, the ALJ
21 found treatment records to reflect improvements in her symptoms
22 with medication. (Tr. 18.) For example, an August 2006 chart note
23 from treatment provider Hickethier stated that Claimant's anxiety
24 and PTSD symptoms improved while taking Cymbalta. (Tr. 18.) In
25 addition, treatment provider Betlinski noted that, "even when
26 claimant was non-compliant with taking her medications, she
27

1 remained functional with the ability to look for a job and cook."
2 (Tr. 18.) Significant weight was given to the opinions of
3 Hickethier and Betlinksie. (Tr. 19.)

4 The opinion of reviewing state agency psychologist Rethinger
5 was also given significant weight. (Tr. 19.) Rethinger "opined
6 that the claimant should not work with the general public but is
7 able to understand, remember and carry out simple tasks." (Tr.
8 19.) Rethinger's assessment was viewed as consistent with treatment
9 records indicating Claimant suffers from anxiety in public settings
10 and has some difficulty with concentration, persistence and pace.
11 (Tr. 19.)

12 Berjettej's third-party function report was also considered at
13 the hearing. (Tr. 19.) Overall, the ALJ found Berjettej's
14 observations "generally credible," but considered her statements
15 regarding Claimant's symptoms and limitations "with caution" based
16 on their personal relationship and Berjettej's lack of medical
17 expertise. (Tr. 19.)

18 As to Claimant's credibility, "records reflect[ed] that her
19 described activities of daily living are not limited to the extent
20 one would expect given her complaints of disabling symptoms and
21 limitations." (Tr. 19.) As a result, because Claimant's symptoms
22 improved when taking prescribed medication, the ALJ found "that the
23 claimant's symptoms are not as limiting as she has alleged." (Tr.
24 19.)

1 Lastly, Claimant had previously been diagnosed with bulimia.
 2 (Tr. 19.) However the ALJ pointed out that a April 2009 chart note
 3 reflected that Claimant's eating disorders were in remission. (Tr.
 4 19, 870.) And, treatment records did not reflect that Claimant had
 5 been hospitalized or suffered any significant limitation as a
 6 result of her eating disorders. (Tr. 19.)

7

8 **4. Step Four**

9 At Step Four, the ALJ noted that Claimant did not have any
 10 past relevant work and then proceeded to the fifth and final step.
 11 (Tr. 16, 19.)⁵

12

13 **5. Step Five**

14 At Step Five, the ALJ made three initial observations:
 15 Claimant was twenty years old when she filed for SSI benefits; she
 16 had a high school education; and that transferability of job skills
 17 was not an issue because Claimant had no past relevant work. (Tr.
 18 20.) The ALJ thus concluded that, "[c]onsidering the claimant's
 19 age, education, work experience, and [RFC], there are jobs that
 20 exist in significant numbers in the national economy that the
 21 claimant can perform." (Tr. 20.) In response to the ALJ's
 22 hypothetical, the VE testified that Claimant was capable of acting

23

24

25 ⁵ See 20 C.F.R. § 416 .965(a) (Past relevant work means work
 26 that was performed in the last fifteen years, lasting long enough
 27 for the claimant to learn the work, and which qualifies as
 28 "substantial gainful activity"); 20 C.F.R. § 416.910 (substantial
 gainful activity is work that involves doing significant and
 productive physical and mental duties, and is done, or intended,
 for pay or profit).

as a kitchen helper, warehouse worker, and hand packer. (Tr. 20.) Each position is classified by the Dictionary of Occupational Titles ("DOT") as medium exertion, unskilled work, and there is availability both regionally and nationally. (Tr. 20.) The VE's testimony was deemed consistent with the information contained in the DOT. (Tr. 20.)

In sum, the ALJ concluded that Claimant "is capable of making a successful adjustment to other work that exists in significant numbers in the national economy. A finding of 'not disabled' is therefore appropriate[.]" (Tr. 20.)

IV. *STANDARD OF REVIEW*

The court may set aside a denial of benefits only if the Commissioner's findings are "'not supported by substantial evidence or [are] based on legal error.'" *Bray v. Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)); accord *Black v. Comm'r*, 433 Fed. Appx. 614, 615 (9th Cir. 2011). Substantial evidence is "'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

The court "cannot affirm the Commissioner's decision 'simply by isolating a specific quantum of supporting evidence.'" *Holahan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett*

1 *v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1998)). Instead, the court
2 must consider the entire record, weighing both the evidence that
3 supports the Commissioner's conclusions, and the evidence that
4 detracts from those conclusions. *Id.* However, if the evidence as
5 a whole can support more than one rational interpretation, the
6 ALJ's decision must be upheld; the court may not substitute its
7 judgment for the ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v.*
8 *Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

10 **V. DISCUSSION**

11 Claimant asserts six grounds upon which the ALJ's decision
12 should be reversed: (1) the ALJ's Step Two and Three findings were
13 incomplete; (2) the ALJ's RFC assessment was incomplete; (3) the
14 ALJ inadequately considered Spendal's opinion; (4) the ALJ's
15 adverse credibility determination was improper; (5) the ALJ
16 improperly rejected lay witness testimony; and (6) the VE
17 hypothetical was incomplete.

18 **A. Step Two Severity Finding and Step Three
19 Listed Impairment Finding**

20 Claimant contends that the ALJ erred by failing to consider
21 her depressive disorder, learning disorder, anxiety disorder, and
22 anorexia at Step Two of the sequential analysis. In essence,
23 Claimant is arguing that the ALJ erred in Steps Two and Three by
24 failing to follow the procedures proscribed in 20 C.F.R. § 416.920a
25 for determining whether she has a severe mental impairment and, if
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27
28

1 so, determining whether that impairment meets or equals any of the
2 listed impairments. Claimant relies exclusively on the Ninth
3 Circuit's decision in *Keyser*, which involved the same alleged
4 errors under Title II's regulations. *Keyser*, 648 F.3d at 725.

5 In the Title XVI context, the psychiatric review technique
6 described in 20 C.F.R. § 416.920a requires an ALJ to assess a
7 claimant's limitations and restrictions from a mental impairment(s)
8 in four functional areas: activities of daily living; social
9 functioning; concentration, persistence, or pace; and episodes of
10 decompensation comprise the four functional areas. 20 C.F.R. §
11 416.920a(c)(3). An ALJ's "written decision *must* incorporate the
12 pertinent findings and conclusions based on the [psychiatric
13 review] technique" and "*must* include a specific finding as to the
14 degree of limitation in each of the functional areas." *Id.* §
15 416.920a(e)(4) (emphasis added). The functional areas are used to
16 rate the severity of mental impairment(s) at Steps Two and Three of
17 the sequential analysis. *Taylor v. Astrue*, No. 3:10-cv-05891, 2011
18 WL 5563373, at *4 (W.D. Wash. Oct. 24, 2011) (citing Social
19 Security Ruling ("SSR") 96-8p, 1996 WL 374184)).

20 In *Keyser*, "the written decision did not document the ALJ's
21 application of the [psychiatric review] technique and did not
22 include a specific finding as to the degree of limitation in any of
23 the four functional areas." *Keyser*, 648 F.3d at 726. Instead, the
24 ALJ simply referenced and adopted a Psychiatric Review Technique
25

1 Form ("PRTF") completed by a state agency medical consultant. *Id.*
 2 In *Keyser*, "the ALJ did not state his findings as to the four
 3 functional areas[.]" *Keyser*, 648 F.3d at 726. The *Keyser* ALJ's
 4 analysis at Step Three was also erroneous because he never
 5 addressed whether the claimant's mental impairment met or equaled
 6 a listed impairment, which was "understandable given the ALJ's
 7 adoption" of the state agency medical consultant's "conclusion that
 8 the medical impairment was not severe." *Id.* at 727.

10 I find Claimant's reliance on *Keyser* misplaced. Claimant
 11 overlooks the fact that, unlike *Keyser*, the ALJ resolved Step Two
 12 in her favor, finding her dysthymia, social phobia, PTSD, and
 13 avoidant personality disorder to be severe impairments. See *Gray*
 14 v. *Comm'r Soc. Sec. Admin.*, 365 Fed. Appx. 60, 61 (9th Cir. 2010)
 15 (rejecting argument that the ALJ erred at step two by determining
 16 certain impairments were nonsevere, because any alleged error was
 17 harmless since "the ALJ concluded that [claimant's] other medical
 18 problems were severe impairments."); see also *Mondragon v. Astrue*,
 19 364 Fed. Appx. 346, 348 (9th Cir. 2010) ("Any alleged error at step
 20 two was harmless because step two was decided in [claimant]'s favor
 21 with regard to other ailments.")

24 Additionally, unlike *Keyser*, the ALJ's written decision is not
 25 devoid of reference to the four functional areas, in fact, his
 26 decision included "a specific finding as to the degree of
 27 limitation in each of the functional areas described in paragraph
 28

(c) of this section." 20 C.F.R. § 416.920a(e)(4). Specifically, an ALJ must rate the first three functional areas (activities of daily living; social functioning; and concentration persistence, or pace), using the following five-point scale: None, mild, moderate, marked, and extreme. *Id.* § 416.920a(c)(4). The ALJ assigned these three functional areas ratings of mild, moderate, and mild to moderate, respectively. (Tr. 16-17.) The fourth functional area (episodes of decompensation), is rated on the four-point scale: None, one or two, three, four or more. *Id.* § 416.920a(c)(4). The ALJ determined that Claimant experienced "no episodes of decompensation." (Tr. 17.)

In short, the ALJ did not commit error at Step Two, or alternatively, if he did, the error was harmless.

Next, Claimant argues that the ALJ failed to conduct a proper Step Three analysis because even non-severe impairments must be considered in determining if she met or equaled a listed impairment. (See Pl.'s Reply Br. at 4) ("The ALJ's lack of findings as Step 2 taints his subsequent findings at Step 3, because the ALJ must consider all impairments in combination when determining whether the claimant's total condition meets a Listing.") At the outset, I note that Claimant did not specifically challenge the ALJ's Step Three finding in her opening brief. Typically, arguments raised for the first time in a reply brief are waived. *Rigbsy v. Astrue*, No. CV 09-00309-EJL-REB, 2010 WL

1 3735672, at *4 n.1 (D. Idaho Aug. 24, 2010). However, for
 2 completeness sake, I will consider this additional argument here.
 3

4 At Step Three, the ALJ must determine whether any of a
 5 claimant's impairments or combination of impairments meet or equal
 6 "one of a number of listed impairments that the [Commissioner]
 7 acknowledges are so severe as to preclude substantial gainful
 8 activity." *Bowen*, 482 U.S. at 141. Here, the ALJ specifically
 9 found that Claimant's "mental impairments, considered singly and in
 10 combination," did not meet or equal any of those on the Listing of
 11 Impairments, 20 C.F.R. Part 404, Subpart P, Appendix 1,
 12 particularly listed diagnosis 12.04 (affective disorders), 12.06
 13 (anxiety-related disorders), and listing 12.08 (personality
 14 disorders). (Tr. 16.)

16 A claimant bears the burden of proving she has an impairment
 17 that meets or equals the criteria of an impairment listed in
 18 Appendix 1 of the Commissioner's regulations. *Burch v. Barnhart*,
 19 400 F.3d 676, 683 (9th Cir. 2005). To meet this burden a claimant
 20 must offer a "theory plausible or otherwise, as to how h[er]
 21 [impairments] combined to equal a listed impairment." *Lewis v.*
 22 *Apfel*, 236 F.3d 503, 514 (9th Cir. 2001). That is to say, a
 23 claimant should "specify which listing she believes she meets or
 24 equals . . . [and] set forth any evidence which would support the
 25 diagnosis and findings of a listed impairment." *Burch*, 400 F.3d at
 26 683.
 27

Although Claimant contends that the ALJ's Step Three impairment finding was tainted, she does not specify which listing she believes she meets or equals. Nor does she cite any evidence she claims would support the diagnosis and findings of a listed impairment. See *Tobin v. Astrue*, No. C 10-02937, 2011 WL 3739537, at *10 (N.D. Cal. Aug. 23, 2011) (holding that "a terse finding that the claimant did not have an impairment or combination of impairments that met or medically equaled one of the listed impairments" was sufficient under *Burch*); *Mehrnoosh v. Astrue*, No. CV-10-52-HZ, 2011 WL 2173809, at *9 (D. Or. June 2, 2011) (finding no error at step three because the plaintiff did not cite evidence in the record supporting her argument that her impairment was severe enough to meet or equal a listing, nor did she identify a particular listing the ALJ should have discussed in the alternative.)

Accordingly, the ALJ did not err in determining whether Claimant's impairments met the requirements of a listing.

B. Residual Functional Capacity Determination

As part of his Step Four determination, the ALJ determined Claimant's RFC. See 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1445; SSR 96-8p, 1996 WL 374184. Claimant's objections to the RFC can be divided into two categories. She argues that the ALJ ignored some and improperly rejected other evidence of the extent of her impairments.

1 The ALJ concluded that Claimant "has the [RFC] to perform a
2 full range of work at all exertional levels but with the following
3 nonexertional limitations: she is limited to routine, unskilled
4 work with no public contact." (Tr. 17.) I first consider whether
5 this evaluation ignored or improperly rejected certain pieces of
6 medical evidence.

7 Claimant argues that the ALJ erred by not giving proper weight
8 to the opinion of Spendal, Claimant's examining psychologist. It
9 is well settled that "the opinion of an examining doctor, even if
10 contradicted by another doctor, can only be rejected for specific
11 and legitimate reasons that are supported by substantial evidence
12 in the record." *Lester*, 81 F.3d at 830-31.

13 After evaluating Claimant, Spendal opined that she had the
14 following "barriers to employment:"

15 • Self-Direction: [Claimant] has the intelligence to be self-
16 directed in the workplace; however, her impaired auditory
17 attentional abilities and tendency to 'space out' which is
18 likely related to the PTSD and lack of coping skills, all mean
19 she will struggle with self-direction. Her dependent features
20 also mean she may struggle to initiate tasks on her own and
21 will likely need closer supervision and guidance than others
22 her age. However, until she gets her social phobia under more
23 control having closer supervision will be difficult since more
24 contact with people, especially someone in a role to critique
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1 her, will be very difficult and may bring on symptoms of
2 panic, depersonalization/dissociation, or 'zoning out'.
3

- 4 • Work Skills: [Claimant] will do approximately equally well in
5 jobs that are verbal and that are visual although with a
6 slight preference for visual tasks. At this time if she had to
7 go to work tomorrow she would need a job with virtually no
8 contact with other people and a job with minimal reading,
9 writing, or math requirements, as well as no timed tasks. She
10 will be slower than average to learn new information due to
11 mental health induced limitations in attention and processing
12 speed. She will need repetition and specialized supervisory
13 strategies.
14
- 15 • Interpersonal Skills: This is where [Claimant] will likely
16 struggle the most. She fears and desires social contact at the
17 same time, but more often her fear wins out and she feels more
18 comfortable isolating herself and limiting social contact.
19 Social situations tend to bring on panic symptoms (or an
20 episode of 'zoning out') and her flat affective style and
21 minimal nonverbal communication (secondary to PTSD) may make
22 her appear unusual to others and cause strain in forming
23 relationships. [Claimant] keeps people at an arms length and
24 suppresses her emotions out of fear and insecurity in her
25 skills to handle both people and her own emotions. Until she
26 learns how to do both things successfully her interpersonal
27
- 28

1 skills will be limited.

2 • Communication: [Claimant] will miss pieces of oral
3 communication due to her anxiety fogging her concentration.
4 She will also have more difficulty than her age peers
5 generating and reading written communication due to her
6 suppressed functional academic skills. Communication will need
7 to be both oral and in writing, and in an oral format
8 repetition will be necessary.

9 • Work Tolerance: [Claimant]'s work tolerance at the current
10 time would be severely limited by her anxiety, depression, and
11 Axis II symptoms [e.g., Avoidant Personality Disorder, with
12 dependent and borderline features]. She would likely need a
13 very part time schedule and frequent breaks during the day.

14 (Tr. 513-15.) Based on Claimant's diagnoses, Spendal stated,
15 "[u]ntil C[claimant] is able to be around people (which will not
16 happen until she can treat her social phobia at least) she is not
17 likely to be able to work in jobs that involve contact with other
18 people." (Tr. 515.)

19 In his written opinion, the ALJ accorded "[s]ome weight" to
20 Spendal's 2006 Learning and Psychological Evaluation. (Tr. 19,
21 500.) He noted that Spendal diagnosed Claimant with dysthymia,
22 social phobia, PTSD, and avoid personality disorder, and opined
23 that Claimant "would have difficulty working due to impaired
24 auditory attentional abilities, social phobia, difficulty
25

1 concentrating, and low academic levels." (Tr. 18.) The ALJ merely
 2 concluded by stating, "[t]he limitations indicated by this examining
 3 physician [are] consistent with the [RFC] determined in this
 4 decision." (Tr. 19.) Nothing more.

5 As an initial matter, the limitations identified by Spendal,
 6 on their face, are not entirely consistent with the ALJ's RFC
 7 determination. For example, Spendal indicated that Claimant's
 8 social phobia needed to be treated before she would be able to work
 9 in jobs that involve contact with other people; that her work
 10 tolerance would be severely limited by her mental impairments; and
 11 that she would need a very part time schedule. Simply limiting
 12 Claimant to routine, unskilled work with no public contact does not
 13 properly encompass Spendal's opinion.

14 The Commissioner argues that "all of the limitations the ALJ
 15 did not adopt were premised with words such as 'likely' and
 16 'recommendations' rather than imperative definite. T[hus,] [t]he
 17 ALJ did not err in not relying on limitation[s] that were provided
 18 as likely or recommendations." (Def.'s Br. at 14.) Even assuming,
 19 arguendo, all of the omitted limitations were premised by such
 20 words, I disagree. See *Yeatman v. Astrue*, No. 3:10-cv-05443-KLS,
 21 2011 WL 1153535, at *3 (W.D. Wash. March 28, 2011) (determining
 22 that the ALJ erred in giving "some weight" to an examining
 23 psychologist's opinion because he failed to mention certain
 24 limitations identified by the doctor, such as "that it was
 25

'unlikely' that [claimant] could maintain a competitive pace or tolerate the typical pressures or interpersonal demands of employment.")

In short, by failing to give any reason to discount Spendal's opinion, the ALJ fell short of presenting specific and legitimate reasons supported by substantial evidence in the record. Without more, I cannot conclude that the ALJ properly evaluated the medical evidence provided by Spendal, nor can I confidently conclude that no reasonable ALJ could have found Claimant disabled for all or part of her alleged period of disability when fully crediting Spendal's opinion. *See Garcia v. Astrue*, No. CV 10-03827, 2011 WL 4500072, at*5 (C.D. Cal. Sept. 28, 2011) (holding that an ALJ's error was not harmless when he failed to mention, or give reasons for rejecting, an examining psychiatrists opinion).

Claimant also asserts the ALJ's assessment of her RFC was incomplete in that the ALJ did not include some of the limitations identified by Rethinger. (Pl.'s Opening Br. at 6.) However, I need not address Claimant's argument concerning portions of Rethinger's assessment because, as discussed further below, the ALJ is to reconsider Spendal's opinion and the ultimate RFC determination on remand. Rethinger's assessment will be part of the record to be considered on remand.

C. Claimant's Credibility

Next, Claimant argues the ALJ erred by improperly failing to

1 credit her subjective complaints. In determining a claimant's RFC,
2 an ALJ must consider all relevant evidence in the record,
3 including, *inter alia*, medical records, lay evidence, and "the
4 effects of symptoms including pain, that are reasonably attributed
5 to a medically determinable impairment." See SSR 96-8p, 374184, at
6 *5; accord 20 C.F.R. § 416.945(a)(3). If the record established
7 the existence of a medically determinable impairment that could
8 give rise to the reported symptoms, an ALJ must make a finding as
9 to the credibility of the claimant's statement about the symptoms
10 and their functional effect. SSR 96-7p, 1996 WL 374186, at *1; 20
11 C.F.R. § 416.929.

12
13 Where, as here, there is no evidence that a claimant is
14 malingering, an ALJ's determination that the claimant is not
15 credible must be based on clear and convincing reasons. *Valentine*
16 v. *Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 693 (9th Cir.2009).
17 The ALJ must specify what testimony is not credible and what
18 evidence undermines it. *Parra v. Astrue*, 481 F.3d 742, 750 (9th
19 Cir. 2007); see also *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036
20 (9th Cir. 2007) ("[T]he ALJ can reject the claimant's testimony
21 concerning the severity of her symptoms only by offering, specific,
22 clear and convincing reasons for doing so.")

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24 The ALJ found that Claimant's "medically determinable
25 impairments could reasonably be expected to cause the alleged
26 symptoms; however, the claimant's statements concerning the
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1 intensity, persistence and limiting effects of these symptoms are
 2 not credible to the extent they are inconsistent with" her RFC.
 3 (Tr. 18.) The ALJ provided two specific reasons for his adverse
 4 credibility finding. First, the ALJ determined that Claimant's
 5 treatment "records reflect her described activities of daily living
 6 are not limited to the extent one would expect given her complaint
 7 of disabling symptoms and limitations." (Tr. 19)

9 Second, the ALJ determined that "treatment records reflect
 10 that the claimant's symptoms improve when she takes prescribed
 11 medication." (Tr. 19) (citing Tr. 519, 870.) For example, in
 12 chart note dated August 2006, Hickethier noted that Claimant's
 13 anxiety and PTSD symptoms improved with Cymbalta. (Tr. 18, 519.)
 14 Similarly, Betlinski's April 2009 chart note provides, in pertinent
 15 part, that:

17 [Claimant is] [f]eeling much better now that she's made
 18 it a point to take her [medication] every day. More
 19 positive, less overwhelmed. Sleep is OK. No vomiting or
 20 other problems associated with her eating disorder. More
 21 optimistic. . . . Mood 'better.' Affect fairly euthymic,
 22 with appropriate range and reactivity. Thoughts relevant,
 23 fairly rational, goal-directed. Future oriented. . . .
 24 [Claimant has] a history of PTSD, depression and an
 25 eating disorder (most likely anorexia) improved with
 26 return to medications as prescribed.

27 (Tr. 870.)

28 The parties do not dispute whether the evidence considered by
 29 the ALJ was appropriate for assessing a claimant's credibility. See
 30 SSR 96-7p, 1996 WL 374186, at *3 (setting forth factors to consider
 31 when assessing credibility, including daily activities and the

1 effectiveness of any medication the individual takes or has taken
2 to alleviate symptoms). As the Ninth Circuit previously has
3 explained, the ALJ is permitted to consider daily living activities
4 in his credibility analysis; however, "[t]he ALJ must make specific
5 findings relating to the daily activities and their transferability
6 to conclude that a claimant's daily activities warrant an adverse
7 credibility determination." *Orn v. Astrue*, 495 F.3d 625, 639 (9th
8 Cir. 2007) (internal quotation marks and citations omitted;
9 alterations deleted). Put another way, "daily activities may be
10 grounds for an adverse credibility finding 'if a claimant is able
11 to spend a substantial part of his day engaged in pursuits
12 involving the performance of physical functions that are
13 transferable to a work setting.'" *Id.* (quoting *Fair v. Bowen*, 885
14 F.2d 597, 603 (9th Cir. 1989)).

17 The Commissioner concedes that the "boilerplate" language
18 utilized in the ALJ's written decision "may not be a model of
19 clarity," but nevertheless argues that he provided clear and
20 convincing reasons for rejecting Claimant's testimony. (Def.'s Br.
21 at 9.) He claims this case parallels *Morgan v. Comm'r of Soc. Sec.*
22 *Admin.*, 169 F.3d 595, 599-600 (9th Cir 1999). (Def.'s Br. at 11-
23 12.) *Morgan* is clearly distinguishable, however. There, "[t]he
24 ALJ pointed to specific evidence in the record . . . identifying
25 what testimony was not credible and what evidence undermined [the
26 claimant]'s complaints," *id.* at 599, such as "the contradictions
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1 between [the claimant]'s reported activities and his asserted
 2 limitations[.]" *Id.* at 600.

3 In this case, however, Claimant's Adult Function Report does
 4 not contradict her allegations, in fact, it makes clear that
 5 Claimant does not go out alone or socialize due to her anxiety, nor
 6 has she ever been able to be around unfamiliar people. (Tr. 210,
 7 212, 214.)

8 Additionally, the ALJ failed to make specific findings
 9 regarding the transferability of Claimant's daily activities.
 10 While in a general sense many of the activities delineated in the
 11 adult function report are indicative of the physical capacity to be
 12 employed, they cannot be said to bear a meaningful relationship to
 13 the activities Claimant would have the most difficulty performing
 14 in the workplace, e.g., social interactions which trigger her
 15 social phobia and anxiety-related symptoms. *See Johnson v. Astrue*,
 16 No. CV-10-3052-CL, 2011 WL 4501230 (D. Or. Sept. 27, 2011) ("If a
 17 claimant's level and type of activity [are not] inconsistent with
 18 her claimed limitations, her activities have [no] bearing on her
 19 credibility." (citing *Fair*, 885 F.2d at 603))). Because the
 20 transferability of Claimant's daily activities are attenuated by
 21 the aforementioned observation, I cannot say the ALJ provided
 22 sufficient reasons based on substantial evidence for rejecting
 23 Claimant's credibility.

24 Moreover, I agree with Claimant that the ALJ's finding that
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1 Claimant is not credible based upon his RFC disregards the role of
 2 the credibility analysis in determining an RFC. In *Carlson v.*
 3 *Astrue*, 682 F. Supp. 2d 1156 (D. Or. 2010), "the ALJ first found
 4 [the claimant]'s testimony 'not credible to the extent' his
 5 statements 'are inconsistent with the' RFC." *Id.* at 1167. *Carlson*
 6 held that "the ALJ's analysis reverses the manner in which he must
 7 consider credibility. The ALJ must consider a claimant's
 8 credibility in the course of assessing a claimant's RFC." *Id.*
 9 (citing 20 C.F.R. § 416.945(a)(3); SSR 96-8p at *7)). Thus, the
 10 ALJ's analysis was flawed because "[n]o authority suggests an ALJ
 11 may reason that a claimant is not credible based upon the
 12 claimant's RFC assessment." *Id.*

13 Similarly, in this case, as in *Carlson*, the ALJ first found
 14 that Claimant's statements concerning the intensity, persistence
 15 and limiting effects of her symptoms were "not credible to the
 16 extent they are inconsistent with the above [RFC] assessment."
 17 (Tr. 18.) I have found no authority, nor is any offered, that
 18 permits an ALJ to evaluate a claimant's credibility based upon
 19 whether their statements are construed as consistent with the ALJ's
 20 subsequent RFC assessment.

21 In summary, the errors concerning the evaluation of Claimant's
 22 credibility compel remand.

23 ***D. Evaluation of Third-Party Testimony***

24 Next, Claimant argues that the ALJ failed to properly consider

1 Berjettej's observations concerning her limitations and "used
2 legally unsupportable [reasons] to reject her statements." (Pl.'s
3 Opening Br. at 17.) The ALJ stated that he considered Berjettej's
4 third-party function report and her hearing testimony. (Tr. 19.)
5 The ALJ found Berjettej's observations "generally credible," but
6 determined that "her statements concerning the claimant's symptoms
7 and limitations are considered with caution because of her personal
8 relationship with the claimant and lack of medical expertise."
9 (Tr. 19.)

10 In determining whether a claimant is disabled, an ALJ is
11 required to consider lay witness testimony concerning a claimant's
12 ability to work. *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir.
13 2009). Such testimony is competent evidence which cannot be
14 disregarded without providing specific reasons that are germane to
15 each witness. *Stout v. Comm'r of Soc. Sec.*, 454 F.3d 1050, 1054
16 (9th Cir. 2006).

17 In *Heide v. Astrue*, 369 Fed. Appx. 775 (9th Cir. 2010), the
18 Ninth Circuit recognized that, although it is improper to reject
19 lay witness testimony based on lack of medical expertise, when
20 other legitimate reasons have been offered, this error is harmless.
21 *Id.* at 777. Here, the ALJ only offers two reasons to reject
22 Berjettej's testimony: she lacks medical expertise and she is
23 Claimant's mother. "The Commissioner concedes that to reject lay
24 witness testimony because of the witness's personal relationship
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with the claimant and lack of medical expertise is *improper*[.]'" (Def.'s Br. at 13) (emphasis added).

Nonetheless, the Commissioner cites *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005), for the proposition that I should "infer the inconsistency with the medical evidence was a germane reason sufficient to discredit lay witness testimony." (Def.'s Br. at 13.) In *Bayliss*, the ALJ accepted lay witness testimony that was consistent with the objective evidence in the record, and rejected testimony that was not. *Id.* Nowhere in the *Bayliss* decision does the court suggest that they inferred the ALJ's reasons. In fact, the only case *Bayliss* cited on this matter was *Lewis v. Apfel*, 236 F.3d 503 (9th Cir. 2001), where it was stated that the ALJ must "expressly . . . disregard [lay] testimony and give reasons germane to each witness for doing so." *Id.* at 511 (emphasis added). Inferring such reasons would clearly be improper and Berjettej's statements should be considered on remand.

E. Vocational Expert Hypothetical

Finally, Claimant argues that the hypothetical situation proposed to the vocational expert by the ALJ failed to take into account all of Claimant's limitations.

By erroneously rejecting, *inter alia*, Claimant's testimony and lay witness statements, the ALJ improperly omitted certain limitations from the RFC that were arguably supported by the record. *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir 1988)

("Hypothetical questions posed to the vocational expert must set out all the limitations and restrictions of the particular claimant[.]") Absent additional, legitimate reasons for rejecting such evidence, the ALJ asked the VE a hypothetical at Step Five that was based on an incomplete set of assumptions. The omissions rendered the question posed, and the VE's response, legally deficient and of no evidentiary value. *Robbins*, 466 F.3d at 886 (recognizing that hypotheticals based on an incomplete set of limitations are legally inadequate and the VE's responses have no evidentiary value). Accordingly, the ALJ's determination that Claimant was not disabled, which was based on the VE's testimony was erroneous. See also *Stillwater v. Comm'r of Soc. Sec.*, 361 Fed. Appx. 809, 812-13 (9th Cir. 2010) (holding that ALJ's hypothetical posed to the VE was deficient when, as here, it was based on the improper rejection of a doctor's opinion, the claimant's testimony, and lay witness statements).

F. Remand

It is within the discretion of the court whether to remand a case for further proceedings or for the immediate payment of benefits. *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004). "[A] remand for further proceedings is unnecessary if the record is fully developed and it is clear from the record that the ALJ would be required to award benefits." *Holohan*, 246 F.3d at 1210. However, it is appropriate to remand for further proceedings in a

1 case in which the ALJ has simply failed to articulate acceptable
2 reasons for discrediting and/or rejecting certain evidence, and
3 adequate findings remain necessary for determining eligibility for
4 disability benefits. See *Light v. Soc. Sec. Admin.*, 119 F.3d 789,
5 793 (9th Cir. 1997).
6

7 I conclude that significant issues remain that must be
8 resolved before a determination of disability can be made, and that
9 further proceedings will be useful. See *Stillwater*, 361 Fed. Appx.
10 at 812-13 (remanding for further proceeding after the ALJ
11 improperly rejected a doctor's opinion, the claimant's testimony,
12 and lay witness statements). On remand, after evaluating the
13 evidence in accordance with the standards identified above, the ALJ
14 should reconsider the hypothetical and the ultimate RFC
15 determination.
16

17 VI. CONCLUSION

18 For the foregoing reasons, I recommend that the decision of
19 the Commissioner regarding Claimant be REVERSED and REMANDED for
20 further proceedings consistent with this Findings and
21 Recommendation and the parameters provided herein.
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23 VII. SCHEDULING ORDER

24 The Findings and Recommendation will be referred to a district
25 judge. Objections, if any, are due **February 27, 2011**. If no
26 objections are filed, then the Findings and Recommendation will go
27 under advisement on that date. If objections are filed, then a
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1 response is due **March 15, 2011**. When the response is due or filed,
2 whichever date is earlier, the Findings and Recommendation will go
3 under advisement.

4 Dated this 8th day of February, 2012.
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7 /s/ Dennis James Hubel

8 Dennis James Hubel
9 United States Magistrate Judge

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